CARLTON FIELDS

Liability Insurers Will Face Enhanced Exposure From New Medicare Requirements in January 2012

September 09, 2011

The Medicare, Medicaid and SCHIP Extension Act imposes new requirements on liability insurers that go into effect on January 1, 2012. The Act requires workers' compensation, no fault, group health and liability insurers to determine the Medicare status of benefit recipients, (2) report certain data to Medicare on a quarterly basis if the claimant is a Medicare beneficiary, and (3) report all settlements with a Medicare beneficiary or a potential Medicare beneficiary. The Act signals Medicare's intention to broaden its approach and to require liability insurers to ensure that Medicare is reimbursed when claims are settled. The Act's complexity precludes a detailed analysis here. The purpose of this Alert is to encourage liability insurers to implement compliance procedures in order to limit exposure to potential Medicare claims. For example:

1. Liability insurers will be required to report Medicare specific information on a quarterly basis for open files in which the claimant is a Medicare beneficiary. This places a burden on insurers to determine the Medicare status of claimants. Medicare has developed model questions, set out in Medicare's website, that should be propounded to all claimants or their attorneys when a liability claim is asserted.

2. Insurers have a continuing obligation to report the specified information to Medicare. Thus, insurers must establish procedures to determine whether the claimant becomes a Medicare beneficiary after the matter has been opened.

3. If a claimant is, or becomes, a Medicare beneficiary by age or disability, Medicare must be reimbursed for payments made to or for the benefit of the beneficiary when the liability insurer settles the claim by making payment. The goal of the enforcement process is to place the burden of reimbursing Medicare for benefits paid to a beneficiary upon liability insurers. This will create significant issues in settlements, and you should consult legal counsel before any settlement is finalized.

4. If the liability claimant is not a Medicare beneficiary at the time of settlement, reimbursement is not required. Nevertheless, it is appropriate for liability insurers to account for future Medicare benefits that might be made to the claimant, i.e., settlement payments may be considered payment for future treatment that will be covered by Medicare. Liability Insurers must consider various techniques such as a "Medicare set-aside" agreement to avoid future liability to Medicare. In Workers' compensation cases, Medicare has indicated that it will review Medicare set-aside agreements in cases that have settled for more than $25,000 if the claimant is a Medicare beneficiary. Medicare will review settlements over $250,000 if there is a reasonable expectation that the claimant will become a Medicare beneficiary within 30 months. These thresholds are suggestive only and not a safe harbor. Guidelines have not yet been established for liability insurers; however, a sample Medicare set-aside agreement is published on Medicare's website.

In summary, Medicare imposes a duty on primary payors such as liability insurers to protect Medicare's interests. Liability insurers must establish guidelines and procedures to comply with the Act. Specific cases should be addressed with the legal advice of your counsel, as strategies used in the past to address Medicare liens may no longer work.

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